

APR 19 2012

GAMBLING COMMISSION
COMM & LEGAL DEPT

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE GAMBLING COMMISSION

In the Matter of the Suspension or
Revocation of the License to Conduct
Gambling Activities of:

MICK FINSTER'S PUB & GRILL
Edmonds, Washington,

Licensee.

OAH No. 2012-GMB-0012
GC No. CR 2011-01400

INITIAL ORDER OF SUSPENSION
OF LICENSE AND ALTERNATIVE
ORDER GRANTING DEFAULT FOR
FAILURE TO APPEAR

Administrative Law Judge John M. Gray conducted an administrative hearing in this matter on April 3, 2012, at the Gambling Commission Office, 4565 7th Avenue, Lacey, Washington.

Stephanie U. Happold, Assistant Attorney General, appeared and represented the Commission. Cameron Baker, Financial Analyst with the Commission, and Amy Schmitt, Special Agent with the Commission, appeared as witnesses for the Commission.

Mick Finster's Pub & Grill ("Finster's"), the Licensee, failed to appear.

On December 23, 2012, the Deputy Director of the Commission caused a Notice of Administrative Charges and Opportunity for an Adjudicative Proceeding ("Notice of Administrative Charges") to be issued against Finster's. The Director alleged that Finster's failed to file its Punchboard/Pull-Tab Activity Report ("PPAR") for the third and fourth quarters of 2011, and had filed its PPAR late for all quarters of the preceding years of 2009, 2010, and the first and second quarters of 2011. The Commission proposed to suspend Finster's gambling license. The Notice of Administrative Charges did not recommend for how long Finster's gambling license should be suspended. The

Commission served the Notice of Administrative Charges on Finster's by mail on December 23, 2011. The record is silent whether the Commission subsequently served the Notice of Administrative Charges by personal service, but Finster's filed its request for an administrative hearing on January 23, 2012. The Commission subsequently issued an Amended Notice of Administrative Charges on February 9, 2012, and mailed it the same day to all parties. The Amended Notice of Administrative Charges also did not recommend for how long Finster's gambling license should be suspended.

The Commission issued the Notice of Hearing on March 14, 2012, notified Finster's of the time and the place of the administrative hearing. The Notice of Hearing also did not recommend for how long Finster's gambling license should be suspended.

The undersigned Administrative Law Judge waited until 1:30 PM for a representative of Finster's to appear. When no representative had appeared by then, the undersigned Administrative Law Judge called the hearing to order. The Commission wished to establish a prima facie case, and offered six (6) exhibits, which were admitted. Financial Analyst Baker and Special Agent Schmitt testified. While the Commission presented its prima facie case in the Licensee's absence, Special Agent Stephanie Beach entered the hearing room to convey a telephone message that the Licensee thought the hearing was on Wednesday, April 4, 2012, and that a person from Finster's located in Edmonds, Washington, wished to appear on behalf of the Licensee. The undersigned Administrative Law Judge treated the telephone message as Finster's request for a continuance, determined that the Notice of Hearing issued on March 14, 2012, plainly identified the

hearing date as Tuesday, April 3, 2012, beginning at 1:00 PM at the Commission's offices in Lacey, Washington, and denied the request for a continuance.

The Administrative Law Judge, having considered the evidence, now enters the following Findings of Fact:

FINDINGS OF FACT

1. Finster's is a business in Edmonds, Washington, that is licensed for Punchboard/Pull-Tab operations. The Commission issued License No. 05-06742, a type 05, class D license, to Finster's. Without more, that license will expire on September 30, 2012.

2. The Commission requires that persons who possess punchboard/pull-tab licenses, such as Finster's, report certain information regarding their punchboard/pull-tab operations, broken down by quarters, to the Commission. The report seeks information about gross gambling receipts, amounts for prizes paid, the cost of the games, the amount of the local gambling tax, the amount of cash over or short from the monthly income summary, an inventory, and the gross sales of food or drink. Licensees formerly had to file these reports four times per year with the Commission, no later than the last day of the month following the close of the reported quarter. The filing requirement changed during 2005. Licensees still are required to report quarterly information, but now must file only twice a year; i.e., one report covering the first and second quarters of the year, and the second report covering the third and fourth quarters of the year.

3. If a licensee keeps good business records, it should take no more than 30 minutes to enter the required information on the form provided to all such licensees.

4. From the first and second quarters of 2008 through the first and second quarters of 2011, Finster's filed its quarterly reports with the Commission, but all of its filings were late, ranging from one day to 167 days late (the 167 day was for the first and second quarters of 2011). Finster's still has not filed its report for the third and fourth quarters of 2011; that report is 64 days late as of the date of this hearing. Exhibit 3.

5. Finster's did not file its PPAR for the third and fourth quarters of 2006 on time, which was January 30, 2007. Exhibit 3.

6. The Commission attempted to persuade Finster's to file timely in the future and did so in a non-adversarial fashion, by sending a letter to Finster's dated February 10, 2006 (from the context of the letter, it appears the actual date of the letter was February 10, 2007). That letter informed Finster's of its failure to file for the third and fourth quarters of 2006 and, that if Finster's submitted its completed report by February 28, 2007, the Commission would not take administrative action against Finster's. Exhibit 5.

7. Finster's filed the PPAR for the third and fourth quarters of 2006 twenty-two days late, on February 21, 2007. Exhibit 3.

8. Finster's did not file its PPAR for the third and fourth quarters of 2008 on time, which was January 30, 2009. Exhibit 3.

9. Again, the Commission attempted to persuade Finster's to file timely, in a non-adversarial fashion, by sending a letter to Finster's dated February 10, 2009. That letter informed Finster's of its failure to file for the third and fourth quarters of 2008 and, that if Finster's submitted its completed report by February 28, 2009, the Commission would not take administrative action against Finster's. Exhibit 6.

10. Finster's filed the PPAR for the third and fourth quarters of 2008 twenty days late, on February 19, 2009. Exhibit 3.

11. The Commission also attempts to resolve issues through its Notice of Violation and Settlement program ("NOVAS"). The Commission authorizes its agents to issue a NOVAS in the field at the business of a license holder, noting the violation and assessing a fine not to exceed \$500, if the licensee agrees to file its quarterly report. If a licensee accepts a NOVAS, the matter does not proceed to the next level, which is the issuance of a notice of administrative charges. The Commission views NOVAS as the next enforcement level after issuance of a letter, such as those described in Findings of Fact No. 6 and 9, above. The Commission and Finster's used a NOVAS on August 19, 2010, to resolve an earlier failure to file quarterly reports, and the amount of the fine was \$300. Exhibit 1, page 3 and testimony of Financial Analyst Baker.

12. On November 19, 2011, Special Agent Schmitt drove to Finster's to discuss its failure to file its quarterly reports timely. Finster's owner, Scott Nord, refused to discuss the matter or to cooperate with Special Agent Schmitt and refused to accept a NOVAS to resolve the matter. Exhibit 1 and testimony of Special Agent Schmitt.

13. The Commission's next step was to file the Notice of Administrative Charges, which it did on December 23, 2011, and subsequently amended with the Amended Notice of Administrative Charges on February 9, 2012. The Notice of Administrative Charges, the Amended Notice of Administrative Charges, and the Notice of Hearing informed Finster's that the Commission sought to suspend Finster's license. The Notice of Hearing also informed Finster's that, if it failed to attend the scheduled hearing on April 3, 2012, the Administrative Law Judge would enter a default order to revoke Finster's gambling license under RCW 34.05.440.

9. Finster's did not appear for the hearing scheduled for April 3, 2011, at 1 PM. The Commission and the undersigned Administrative Law Judge waited until 1:33 PM for a representative of Finster's to appear. The Commission presented a prima facie case and, as alternative relief, asked for a default order and the revocation of Finster's gambling license.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Administrative Law Judge now enters the following Conclusions of Law:

1. The undersigned Administrative Law Judge has jurisdiction to hear and initially decide this matter in an adjudicative proceeding. RCW 34.05.485(1)(c), 34.12.030(1), 9.46.095 and WAC 230-17-025.

2. During the time material to this case, Finster's has possessed a Punchboard/Pull-Tab license authorizing it to operate punchboards and pull-tabs, and is subject to the provisions of RCW 9.46.075 and WAC 230-03-085.

3. The Legislature declared that the "operation of punchboards, pull-tabs, card games and other social pastimes, **when conducted pursuant to the provisions of this chapter and any rules and regulations adopted pursuant thereto**, are hereby authorized." RCW 9.46.010. (Emphasis supplied).

4. RCW 9.46.0325 authorizes punchboard and pull-tab operations: "The legislature hereby authorizes any person, association or organization operating an established business primarily engaged in the selling of food or drink for consumption on the premises to conduct social card games and to utilize punchboards and pull-tabs as a commercial stimulant to such business **when licensed and utilized or operated pursuant to the provisions of this chapter and rules and regulations adopted pursuant thereto**." (Emphasis supplied).

5. Chapter 230-14 WAC contains the Commission's adopted administrative rules pertaining to punchboards and pull-tabs. WAC 230-14-284 requires activity reports from punchboard and pull-tab licensees:

Punch boards and pull-tab licensees must submit an activity report to the commission. Licensees must complete the report in the format we require and must:

- (1) Cover the periods:
 - (a) January 1 through June 30; and
 - (b) July 1 through December 31; and
- (2) Be received at our administrative office or postmarked no later than thirty days following the end of the reporting period; and
- (3) Be signed by the licensee's highest ranking executive officer or a designee. If someone other than the punch board and pull-tab licensee or its employee prepares the report, then it must provide the preparer's name and business telephone number; and
- (4) Be filed even if they do not renew their license. They must file a report for the period between the previous report filed and the expiration date of the license; and

(5) Unless they are also licensed for Class D or above bingo, charitable and nonprofit licensees must submit a semiannual activity report for punch boards and pull-tabs; and

(6) Class D or above bingo licensees with a punch board and pull-tab license must report punch board and pull-tab activity, on the combined quarterly report provided by the commission as explained in WAC 230-10-331.

6. RCW 9.46.075 contains Commission's authority to deny a license application, and to suspend or revoke a license already issued. This statute has eleven subsections that describe the reasons for denying a license, or suspending or revoking a license. RCW 9.46.075(1) provides:

The commission may deny an application, or suspend or revoke any license or permit issued by it, for any reason or reasons, it deems to be in the public interest. These reasons shall include, but not be limited to, cases wherein the applicant or licensee, or any person with any interest therein: Has violated, failed or refused to comply with the provisions, requirements, conditions, limitations or duties imposed by chapter 9.46 RCW and any amendments thereto, or any rules adopted by the commission pursuant thereto, or when a violation of any provision of chapter 9.46 RCW, or any commission rule, has occurred upon any premises occupied or operated by any such person or over which he or she has substantial control[.]"

7. Chapter 230-03 contains the Commission's adopted administrative rules pertaining to permitting and licensing. WAC 230-03-085 explains in more detail the circumstances under which the Commission may deny, suspend, or revoke an application, license, or permit. WAC 230-17-085(1) provides:

We may deny, suspend, or revoke any application, license or permit, when the applicant, licensee, or anyone holding a substantial interest in the applicant's or licensee's business or organization: Commits any act that constitutes grounds for denying, suspending, or revoking licenses or permits under RCW 9.46.075[.]

8. WAC 230-03-085(3) provides:

We may deny, suspend, or revoke any application, license or permit, when the applicant, licensee, or anyone holding a substantial interest in the applicant's or licensee's business or organization: Has demonstrated willful disregard for

complying with ordinances, statutes, administrative rules, or court orders, whether at the local, state, or federal level[.]

9. WAC 230-03-085(7) provides:

We may deny, suspend, or revoke any application, license or permit, when the applicant, licensee, or anyone holding a substantial interest in the applicant's or licensee's business or organization: Fails to provide us with any information required under commission rules within the time required, or, if the rule establishes no time limit, within thirty days after receiving a written request from us[.]

10. I conclude that the Commission proved by a preponderance of the evidence that Finster's violated RCW 9.46.075(1) because of Finster's failure to comply with RCW 9.46.0325, which allows punchboard and pull-tab operations only "when conducted pursuant to the provisions of this chapter and any rules and regulations adopted pursuant thereto." Finster's violations of the administrative rules in particular are discussed below.

11. The Commission proved by a preponderance of the evidence that Finster's violated WAC 230-03-085(1) because Finster's violated the provisions of RCW 9.46.075(1).

13. The Commission proved by a preponderance of the evidence that Finster's violated WAC 230-03-085(3) because it has filed its quarterly reports late and, more recently, has failed to file at all for the third and fourth quarters of 2011, violating WAC 230-14-284. The reports contain information sought by the Commission in order to carry out its legislatively imposed mandate of regulating gambling in Washington State.

The evidence also shows that it is far from burdensome to complete the form and return it to the Commission.

14. The Commission proved by a preponderance of the evidence that Finster's⁴ violated WAC 230-03-085(7) because Finster's failed to timely file its quarterly reports to the Commission which, as noted above, contain information required by the Commission to carry out its legislative imposed mandate to regulate gambling in Washington State.

15. Each licensee has an affirmative responsibility to establish, by clear and convincing evidence, his continuing qualifications for licensure. RCW 9.46.153(1). Each holder of a license issued pursuant to chapter 9.46 RCW is subject to continuous scrutiny regarding his general character, integrity and ability to engage in or participate in, or associate with, gambling or related activities impacting this state. RCW 9.46.153(7). Finster's failed to appear at the administrative hearing and, consequently, failed to establish its qualifications for licensure at all.

16. To closely control all factors incident to the activities authorized in chapter 9.46 RCW, the provisions of the chapter shall be liberally construed to achieve such ends. The general public can find itself in a particularly vulnerable position if a person licensed to conduct gambling activities fails to discharge his occupation with a sense of justice and honesty. Finster's shows a pattern of untimely reporting and failing to report to the Commission.

17. The Commission originally sought a suspension of Finster's gambling license. The evidence has established that, at a minimum, the suspension of Finster's's Punchboard and Pull-Tab license is in the public interest because Finster has been repeatedly late filing the required information in 2008, 2009, 2010, and 2011,

and has yet to file its third and fourth quarter 2011 report. WAC 230-17-137 contains the Commission's guidelines for imposing penalties in disciplinary actions. Finster's failure to comply with the statutory and administrative reporting requirements proves its unwillingness to comply with the statutes and administrative rules relating to gambling. I have considered the factors in WAC 230-17-137 and find these factors specifically to apply in Finster's case: subsections (a), (d)(i), (d)(ii), (e), and (i). The Commission informed Finster's, through both Notices of Administrative Charges and the Notice of Hearing, that it would pursue the suspension of Finster's gambling license. Finster's has demonstrated its refusal to comply with legislative admonition that the operation of punchboards and pull-tabs is authorized only when conducted pursuant to the provisions of chapter 9.46 RCW and Title 230 WAC. Considering the lack of Finster's cooperation with the Commission, the Commission's efforts to urge compliance by Finster's with the PPAR reporting requirements, Finster's pattern of failing to report timely or to report at all, and Finster's failure to attend and testify in the administrative hearing which Finster's itself requested, therefore, I conclude that, on the merits of the case, Finster's license no. 05-06742 shall be suspended for 180 days, effective on the entry of this Initial Order.

8. With regard to the Commission's alternative relief, a default order, I note that RCW 34.05.440(2) provides, in relevant part: "If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding . . . the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order." The language in the Notice of Hearing concerning the

consequences of default, revocation of the gambling license, exceeded the consequences sought by the Commission in both Notices of Administrative Charges and elsewhere in the Notice of Hearing. I conclude that revoking based upon Finster's failure to appear at the hearing is unjustified. Therefore, in the alternative, I conclude that the Licensee, Mick Finster's Pub & Grill, is in DEFAULT for its failure to appear for the April 3, 2012, hearing, and its license no. 05-06742 is suspended for 180 days.

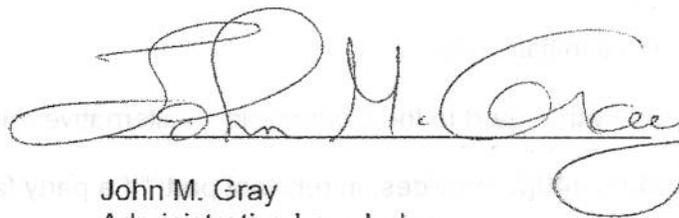
From the foregoing conclusions of law, NOW THEREFORE,

INITIAL ORDER

IT IS HEREBY ORDERED That the Punchboard/Pull-Tab license of Mick Finster's Pub & Grill be, and the same is, SUSPENDED for 180 days.

Alternatively, the Licensee, Mick Finster's Pub & Grill, is in DEFAULT and its Punchboard/Pull-Tab license is SUSPENDED FOR 180 DAYS. A request that this order be vacated must be filed within seven days of service of this order, stating the grounds relied upon. RCW 34.05.440(3).

DATED at Olympia, Washington, this 18 day of April, 2012.



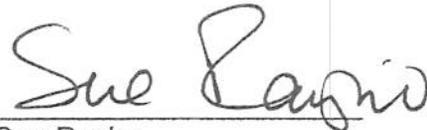
John M. Gray
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO THE PARTIES

Initial orders must be entered in accordance with RCW 34.05.461(3). WAC 230-17-085(1). An initial order becomes the final order unless a party files a petition for review of the initial order as explained in WAC 230-17-090. WAC 230-17-085(2). RCW 34.05.464 governs the review of initial orders. WAC 230-17-090(1). Any party to an adjudicative proceeding may file a petition for review of an initial order. Parties must file the petition for review with us within twenty days of the date of service of the initial order unless otherwise stated. Parties must serve copies of the petition to all other parties or their representatives at the time the petition for review is filed. WAC 230-17-090(2). Petitions must specify the portions of the initial order the parties disagree with and refer to the evidence in the record on which they rely to support their petition. WAC 230-17-090(3). Any party to an adjudicative proceeding may file a reply to a petition for review of an initial order. Parties must file the reply with us within thirty days of the date of service of the petition and must serve copies of the reply to all other parties or their representatives at the time the reply is filed. WAC 230-17-090(4). Any party may file a cross appeal. Parties must file cross appeals with us within ten days of the date the petition for review was filed with us. WAC 230-17-090(5). Copies of the petition or the cross appeal must be served on all other parties or their representatives at the time the petition or appeal is filed. WAC 230-17-090(6). After we receive the petition or appeal, the commissioners review it at a regularly scheduled commission meeting within one hundred twenty days and make a final order. WAC 230-17-090(7).

Certification of Mailing

I certify that I mailed true and correct copies of the **Initial Order of Dismissal Based on Default** to the following parties, postage prepaid this 18th day of April 2012 at Jacoma, Washington.



Sue Rayho
Legal Secretary

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INITIAL ORDER OF SUSPENSION AND
ALTERNATIVE DEFAULT ORDER

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